UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ARTHULY HOWARD SHAW	:	
	:	PRISONER
v.	:	Case No. 3:04CV787(WWE)
	:	
RAY LOPEZ, et al.	:	

MEMORANDUM OF DECISION

Plaintiff Arthuly Howard Shaw ("Shaw"), a former federal inmate, filed this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. § 1915. Shaw has filed a completed complaint form with a type-written complaint attached. He names as defendants in the form portion of the complaint Probation Officer Ray Lopez; the Warden of the Donald W. Wyatt Detention Facility in Central Falls, Rhode Island; and Warden Frederick Menefee of the Federal Correctional Institution in Otisville, New York. In the type-written portion of the complaint, Shaw names as defendants, The United States of America; Federal Bureau of Prisons–Otisville FCI; Donald Wyatt Detention Center; and Raymond Lopez. Shaw states that he brings this action for damages pursuant to 42 U.S.C. § 1983 for violation of his rights under the Due Process Clause of the Fourteenth

Amendment. Shaw alleges that after he voluntarily surrendered on a violation of probation, he was not afforded a timely parole revocation hearing and was held without a hearing for over five months. For the reasons that follow, the complaint will be dismissed.

I. Standard of Review

Shaw has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. The court must screen all complaints filed by persons granted leave to proceed in forma pauperis to ensure that only cognizable claims proceed. See 28 U.S.C. §§ 1915(e). The court must dismiss any case where the action is frivolous, fails to state a claim upon which relief may be granted or seeks monetary damages from a defendant who is immune from that relief. See 28 U.S.C. § 1915 (e)(2)(B)(i) - (iii). Dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000). The court will not, however, dismiss a complaint sua sponte as frivolous if the complaint fails to include all required details to state a cognizable claim. See Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998).

In reviewing the complaint, the court assumes that plaintiff's factual allegations are true and draws inferences from these allegations in the light most favorable to the plaintiff. See Cruz, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d. Cir. 1999)). Dismissal of the complaint under 28 U.S.C. 1915(e)(2)(B)(ii), is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In addition, the court will permit a pro se plaintiff who proceeds in forma pauperis to amend his complaint unless the court determines that there is no possibility that an amended complaint could successfully state a claim. See Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

II. Factual Allegations

Shaw alleges that on December 5, 2000, he was on "Federal Parole." Defendant Lopez was Shaw's federal probation officer. On the evening of December 5, 2000, Shaw was arrested for narcotics violations. Shaw posted bond and reported the incident to defendant Lopez. Shaw and defendant Lopez agreed that Shaw would turn himself in on February 12, 2001. Shaw voluntarily surrendered on that date.

On February 18, 2001, a preliminary hearing was held. Shaw states that the purpose of the hearing was to prepare for a probable cause hearing on his violation of parole. Shaw was not afforded the right to representation by counsel at the preliminary hearing and was not permitted to present witnesses.

Following the hearing, Shaw was held at the Wyatt Detention Center until July 26, 2001. He was not afforded a parole revocation hearing within sixty days as required under 18 U.S.C. § 4214. On July 26, 2001, a nolle entered on the underlying charge because Shaw was not produced for pretrial hearings. Shaw never stipulated to the existence of probable cause on the underlying charges.

That same day, a probable cause and parole revocation hearing was held. The "Defendant" found probable cause that Shaw had violated parole. As a result, Shaw was held for an additional twenty-nine months.

Shaw also alleges that Attorney Jon J. Einhorn, who represented Shaw at the parole revocation hearing, conspired with the parole commission to continue his incarceration.[1]

III. Discussion

[1]Attorney Einhorn, however, is not a defendant in this action. Shaw states in the form complaint that he has filed another action against Attorney Einhorn.

Shaw states that he brings this action pursuant to 42 U.S.C. § 1983. To state a claim for relief under section 1983, Shaw must allege that a person acting under color of state law has deprived him of a constitutionally or federally protected right. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986). A section 1983 action is not cognizable against the defendants because no defendant is a state employee or entity acting under color of state law as required by 42 U.S.C. § 1983. See Powell v. Kopman, 511 F. Supp. 700, 704 (S.D.N.Y. 1981) (federal government exempt from the proscriptions of § 1983; that section does not permit relief against federal officers for action taken under color of federal law). Indeed, there are no references to state law in either portion of the complaint. Thus, all claims brought pursuant to section 1983 will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Liberally construing the complaint, the court considers Shaw's allegations as an action filed pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir. 1994) (section 1983 claim asserted against federal agency and federal officials should be

construed as a Bivens claim). A Bivens action is the nonstatutory federal counterpart of a suit brought pursuant to 42 U.S.C. § 1983 and is aimed at federal rather than state officials. See Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981); Chin v. Bowen, 655 F. Supp. 1415, 1417 (S.D.N.Y.), aff'd, 833 F.2d 21, 24 (2d Cir. 1987) (citations omitted). In a Bivens action, damages may be obtained for injuries caused by a federal agent acting "under color of his authority" in violation of a claimant's constitutionally protected rights. See Bivens, 403 U.S. at 395; Platsky v. C.I.A., 953 F.2d 26, 28 (2d Cir. 1991).

A. Defendants United States of America and Federal Bureau of Prisons–Otisville FCI

Shaw has named the United States of America and the Federal Bureau of Prisons–Otisville FCI as defendants in this action. A Bivens action will only lie against a federal government official. Any such action against the United States is routinely dismissed. See Mack v. United States, Fed. Bureau of Investigation, 814 F.2d 120, 122-23 (2d Cir. 1987). See F.D.I.C. v. Meyer, 510 U.S. 471, 486 (1994) (holding that actions for damages against federal agencies are not cognizable under Bivens). Thus, Shaw's claims against defendants United States of America and Federal Bureau of

Prisons–Otisville FCI will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Furthermore, sovereign immunity bars suits against the United States government and its agencies. See id. at 475. Sovereign immunity is jurisdictional in nature. Thus, without a waiver of immunity, a district court lacks jurisdiction to entertain a case against the federal government or its agencies. See id. Any waiver of sovereign immunity must be expressed in unequivocal terms. See United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992). The United States has not waived its sovereign immunity for damages arising from constitutional violations. See Platsky v. C.I.A., 953 F.2d at 28; Keene Corp. v. United States, 700 F.2d 836, 845 n.13 (2d Cir.) cert. denied, 464 U.S. 864 (1983). Thus, Shaw's claims for monetary damages against these defendants also could be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

B. Defendants Lopez and Menefee

Shaw does not indicate whether he names defendants Lopez and Menefee in their individual or official capacities. A claim against a federal employee in his official capacity is, essentially, a suit against the United States. See, e.g., F.D.I.C. v. Meyer, 510 U.S. at 485-86. The United States has not waived its sovereign immunity for damages claims arising

from actions of federal employees in their official capacities. Thus, Shaw's claims against defendants Lopez and Menefee in their official capacities are considered claims against the United States which are precluded under the doctrine of sovereign immunity.

A Bivens actions enables a plaintiff to recover damages against federal defendants acting in their individual capacities where their conduct is found to violate constitutional rights. See Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981). To establish a Bivens claim, Shaw must demonstrate each defendant's direct or personal involvement in the incident that gave rise to his constitutional deprivation. See Barbera v. Smith, 836 F.2d 96, 99 (2d Cir. 1987), cert. denied sub nom. Barbera v. Schlessinger, 489 U.S. 1065 (1989). A supervisory official who has not directly participated in the conduct complained of may be found personally involved if he created, or permitted to continue, the policy or practice pursuant to which the alleged violation occurred or acted recklessly in managing his subordinates who caused the unlawful incident. See id. (citing Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986). Liability may not be established on a pure respondeat superior theory. See Ellis v. Blum, 643 F.2d at 85.

Defendant Menefee is the warden at FCI Otisville. Shaw alleges no facts suggesting that defendant Menefee was involved in the delay in scheduling the probable cause hearing or the parole revocation hearing. Shaw alleges that he was confined at Wyatt Detention Center during this entire period, not at FCI Otisville. The absence of any facts from which the court could infer a claim against defendant Menefee requires the court to dismiss all claims against defendant Menefee.

Shaw identifies defendant Lopez as the U.S. Probation Officer to whom he reported while on parole. He contends that defendant Lopez failed to schedule a timely probable cause hearing and conducted a preliminary interview at which Shaw was denied assistance of counsel and the ability to call witnesses.

The court takes judicial notice of the United States Parole Commission Rules and Procedures Manual. Section 2.48, entitled "Revocation, Preliminary Interview," provides that a U.S. Probation Officer may conduct the preliminary interview to determine whether there is probable cause to believe that parole was violated. The court assumes that the preliminary hearing referenced in the complaint is this preliminary interview. Section 2.48 requires that the probation officer who recommends that the warrant be issued not be the probation

officer who conducts the preliminary interview. See U.S. Parole Comm'n Rules & Procedures Manual § 2.48(a) (8-15-03). In addition, Notes and Procedures § 2.48-01(a) following this section provides: "The probation officer supervising the case or recommending the warrant may not conduct the preliminary interview."

Shaw alleges that defendant Lopez, his supervising probation officer, advised him that he should turn himself in on the possible parole violation. Thus, as supervising probation officer, defendant Lopez was precluded from conducting the preliminary interview. In addition, the preliminary interview was conducted on February 18, 2001. Shaw, who had been released from custody of the Federal Bureau of Prisons before he filed the complaint, did not commence this action until May 12, 2004. The limitations period for filing a Bivens action is three years. See Chin v. Bowen, 833 F.2d 21, 23-24 (2d Cir. 1987) (holding that same statute of limitations applies to Bivens and section 1983 actions); Lounsbury v. Jeffries, 25 F.3d 131, 134 (2d Cir. 1994) (holding that limitations period for filing section 1983 action in Connecticut is three years). Thus, any claims regarding the preliminary interview had to be filed on or before February 18, 2004. Accordingly, all claims regarding

the preliminary interview will be dismissed as time-barred.

The manual goes on to provide that if the officer who conducted the preliminary interview determines that probable cause may be found to support a violation of parole, the Regional Commissioner notifies the parolee of his final decision concerning probable cause. See U.S. Parole Comm'n Rules & Procedures Manual § 2.48(d)(2). Notes and Procedures § 2.48-03 elaborates on the process. The officer who conducts the preliminary interview submits to the Regional Commissioner a summary of the preliminary interview, including his recommendation regarding probable cause. After reviewing the summary, the Regional Commissioner, inter alia, determines whether probable cause exists and, if so, orders a parole revocation hearing be conducted.

As indicated above, defendant Lopez could not conduct the preliminary interview because he was Shaw's probation officer. In addition, defendant Lopez is not a parole commissioner. Thus, the court can discern no possible involvement by defendant Lopez in the alleged delay in conducting the parole revocation hearing. All claims against defendant Lopez will be dismissed pursuant to 28 U.S.C. § 1915(e)92)(B)(ii).

C. Defendants Wyatt Detention Center and Warden at Wyatt Detention Center

Finally, Shaw names as defendants the Wyatt Detention Center and the warden of that facility. Shaw characterizes Wyatt Detention Center as part of the Federal Bureau of Prisons. This characterization is incorrect.

In 1991, the State of Rhode Island enacted a statute authorizing municipalities to create public corporations to own and operate detention facilities. The statute was designed both to promote economic development and to build a facility in which the United States Marshal Service could house federal pretrial detainees. See Sarro v. Cornell Corrections, Inc., 248 F. Supp. 2d 52, 54 (D.R.I. 2003). Pursuant to this statute, the city of Central Falls created the Central Falls Detention Facility Corporation ("the corporation") to build and own a facility. The corporation is not part of the city. Instead it is "'an instrumentality and agency of the municipality, but has a distinct legal existence from the municipality.'" Id. at 55 (quoting R.I. Gen. Laws § 45-54-1). The facility was built and named the Donald F. Wyatt Detention Center.

The corporation entered into contracts with the United States Marshal Service to house federal pretrial detainees and with Cornell Corrections, a private corporation later known as Cornell Companies, Inc., to operate the facility and employ

all staff members. See id.

Wyatt Detention Center, therefore, is only the name of a building. Because a Bivens action is not cognizable against a building, all claims against defendant Wyatt Detention Center will be dismissed. Further, even if the court were to construe the claims against Wyatt Detention Center as against Cornell Companies, Inc., the claims should be dismissed. A private corporation operating a prison is not subject to suit under Bivens. See Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 73 (2001).

The Supreme Court has not determined whether an employee of a privately operated correctional facility housing federal prisoners is subject to suit in a Bivens action. The court need not resolve this issue. Even if the warden at Wyatt Detention Center were a proper defendant, Shaw has not stated a cognizable claim against him. Shaw does not challenge the conditions of his confinement at Wyatt Detention Center. He alleges only that he was housed there while waiting a determination of probable cause and a parole revocation hearings. As indicated above, the hearing is ordered by the Regional Commissioner. The warden would have no authority to schedule a hearing on his own. In addition, absent a validly issued writ, the warden has no authority to release Shaw.

Thus, the court cannot discern how the warden at Wyatt Detention Center was involved in any of the claims included in this action. All claims against defendant warden at Wyatt Detention Center will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

IV. Conclusion

The complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Shaw is not given leave to file an amended complaint because the court can discern no basis for a claim against any of the defendants included in this action. The Clerk is directed to enter judgment and close this case.

SO ORDERED this 17th day of June, 2004, at Bridgeport, Connecticut.

_____/s_____
Warren W. Eginton
Senior United States District Judge